EX PARTE OR LATE FILED

March 18, 1998

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, WT Docket No. 97-112; Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6

Dear Ms. Salas

GTE Service Corporation, SBC Corporation, and Vanguard Cellular Systems, Inc. d/b/a Western Florida Cellular Telephone Corp., ("the coalition") hereby respond to concerns raised by Federal Communications Commission ("FCC" or "Commission") staff in the course of an *ex parte* presentation made on November 18, 1997, by the coalition and other land-based cellular licensees ("the coalition") serving areas adjacent to the Gulf of Mexico.

At that meeting, Commission staff suggested that the FCC was legally obligated to auction licenses to provide cellular service to unserved area in the Gulf of Mexico pursuant to recent amendments to Section 309(j) of the Communications Act ("the Act"), 47 U.S.C. § 309(j). As explained below, GTE believes that the FCC is only obligated to conduct spectrum auctions if it deems portions of the Gulf of Mexico to be "unserved area" and if it receives mutually exclusive applications for authority to serve the Gulf. If instead, however, the Commission invokes its Section 303, 47 U.S.C. § 303, authority to alter the market areas of existing licensees as recommended by the coalition and others, no unserved area would be created and there would be no need for the Commission to solicit applications or to conduct spectrum auctions.

By way of background, in its Gulf of Mexico proceeding, the Commission has proposed (1) to create a "Coastal Zone" encompassing the Gulf waters within 12 miles of the coast line; (2) treat unserved portions of the Coastal Zone as

unserved area; (3) accept Phase II unserved area applications; and (4) conduct auctions in the event of mutually exclusive applications. The coalition and other land-based cellular providers, however, have requested that the Commission abandon this proposal in favor of extending the market area of land-based cellular licensees adjacent to the Gulf to encompass the Coastal Zone (the "alternative proposal"). Under the alternative proposal, land-based cellular providers would be given a reasonable period of time to build-out their systems to provide service in coastal waters, and, during this time, no part of the coastal waters would be considered "unserved area."

In response to the alternative proposal, Commission staff, citing amended Section 309(j)(2) of the Act, 47 U.S.C. § 309(j)(2), raised concerns that the FCC, with few exceptions, no longer has the authority to elect not to conduct spectrum auctions. Commission staff questioned whether this amended language bars the Gulf remedy the coalition has proposed.

The coalition believes that the new spectrum auction requirements do not bar the coalition's proposed Gulf solution. The coalition agrees with the Commission's reading of Section 309(j)(2). Under the amended language, unless cellular service in the Gulf of Mexico qualifies under the statutory exemptions, the Commission must select licensees among mutually exclusive applicants using spectrum auctions. The coalition believes, however, that the Commission is not required to accept license applications for the Gulf. If no applications are accepted, Section 309(j) would not be invoked.

More specifically, the coalition believes that the Commission has the authority under Section 303 of the Act, 47 U.S.C. § 303, to extend the license area of land-based cellular providers adjacent to Gulf. Section 303 of the Act lists the general powers of the Commission to regulate transmission by radio frequencies as the public convenience, interest, or necessity requires. 47 C.F.R. § 303. Among the authority granted the Commission under this Section are: the "authority to establish areas or zones to be served by any station," 47 U.S.C. § 303(h); the power to "make such regulations . . . necessary to prevent interference between stations and to carry out the provisions of this Act," 47 U.S.C. § 303(f); and authority to "make such rules and regulations and prescribe such restrictions necessary to carry out the provisions of this Act . . ." 47 U.S.C. § 303(r).

The coalition believes that these Section 303 provisions authorize the Commission to re-draw the market boundaries of land-based carriers to encompass the coastal waters of the Gulf. First, the Commission has the authority to designate the area to be served both by the Gulf carriers and by land-based cellular providers adjacent to the Gulf. Should the Commission

believe that the public interest, convenience, and necessity would be served by changing cellular providers' market area, Section 303(h) authorizes it to do so. Second, the coalition has shown that the presence of a strong signal emanating from the Gulf carriers at the Gulf coast shoreline interferes with land-based cellular providers' ability to provide reliable coverage on Gulf beaches, and results in customers on land roaming onto Gulf-based carriers' systems. Given that the action requested by the coalition would prevent this interference (or at least move it out into Gulf where its effect will be minimized), such action is also authorized under Section 303(f). Finally, the general powers conferred under Section 303(r) provide additional authority for the requested action.

Under the alternative proposal, the Commission would invoke its Section 303 authority to extend the market areas of land-based cellular providers into the coastal waters of the Gulf. By so doing, the Commission would avoid, at least initially, creating any "unserved area" in the Gulf. With no "unserved area" to fill-in, applications to serve the Gulf would not need to filed, and spectrum auctions would not be required.

This statutory analysis is consistent with other provisions of the Act. For example, Section 309(j)(6) sets forth rules of construction for interpreting the Commission's authority under Section 309(j). Section 309(j)(6)(C) provides that nothing in Section 309(j) shall "diminish the authority of the Commission under the other provisions of this Act to regulate or reclaim spectrum licenses." 47 U.S.C. § 309(j)(6)(C). Thus, the Commission's authority to act under Sections 303(h), (f), and (r) is not subject to the provisions of Section 309(j). Moreover, the fact that the action requested by the coalition would eliminate an opportunity for the Commission to raise federal revenues may not be considered as a factor in determining what course of action in this proceeding would best serve the public interest, convenience, and necessity. 47 U.S.C. § 309(j)(7).

In addition, FCC and United States Court of Appeals precedent supports FCC action to amend the service area of licensed cellular providers in the context of a Section 303 rulemaking proceeding rather than through a Section 309 adjudicatory proceeding.

In particular, in 1992, the Commission adopted rules that expanded the cellular geographic service area ("CGSA") of existing licensees and shrunk the unserved area available to interested applicants. The Commission based its action on record evidence supporting a finding that reliable cellular coverage could be provided at lower power levels. Thus, the Commission amended its rules to provide that cellular carriers' CGSAs be determined by 32 dBu contours rather than 39 dBu contours. As a result, the size of most carrier's CGSAs was

increased and the amount of unserved area available was decreased.[1]

The Committee for Effective Cellular Rules ("CECR"), a representative of parties interested in filing unserved area applications, challenged the Commission's action in that proceeding on legal grounds. In an action before the United States Court of Appeals for the District of Columbia Circuit, the CECR argued, *inter alia*, that the FCC lacked authority to modify existing licenses through rulemaking rather than through the general adjudicatory process for modifying licenses.[2] The CECR claimed that the FCC erred in not requiring applications for license modification (pursuant to Section 308(a) of the Act) and in not offering opportunity for competitive hearing before modifying the license (pursuant to Section 309(e) of the Act). Citing to *Ashbacker Radio Corp. v. FCC,* 326 U.S. 327 (1945), the CECR argued that the Commission had improperly "established the licensee itself by rule."[3]

In response, the FCC defended the use of its general rulemaking powers to promulgate rules of general applicability.[4] The Commission cited a litany of cases establishing the principle that "licenses may be modified through rule making proceedings without affording parties an adjudicatory hearing, if the generic rules are otherwise procedurally and substantively valid."[5]

The Court of Appeals upheld the FCC's action and attempted to clarify the law in this area. The Court stated that the Commission may not use its rulemaking

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1 Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, CC Docket No. 90-6, *Second Report and Order*, 7 FCC Rcd 2449, 2552-2455 (1992) (hereinafter "*Second Report and Order*"); *affirmed on reconsideration Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd 1363 (1993) (hereinafter "*Reconsideration Order*").

2 *Committee for Effective Cellular Rules v. Federal Communications Commission*, 53 F.3d 1309, 1314 (1995) (hereinafter "*CECR v. FCC*").

3 *CECR v. FCC*, 53 F.3d at 1318.

4 In adopting and upholding its rules, the Commission relied upon Sections 4(i) and (j) and 303(r) of the Communications Act, 47 U.S.C. §§ 154(i), 154 (j), 303 (r). *See, e.g., Second Report and Order,* 7 FCC Rcd at 2458.

5 *Reconsideration Order*, 8 FCC Rcd at 1364.

authority to grant or modify individual licenses.[6] It ruled, however, that the Commission may adopt rules that modify existing licenses when issues involve legislative rather than adjudicative facts and when the new policy is based upon the general characteristics of an industry.[7] The Court ultimately found that the Commission, in adopting the new CGSA calculation method, "established a rule of general applicability." The Court stated that it found "no individual action here masquerading as a general rule."[8]

Applying the rule established in *CECR v. FCC* to the Gulf of Mexico proceeding, then, it is clear that the Commission may take the action requested by GTE and other land-based cellular providers. In the Gulf of Mexico proceeding, the land-based cellular providers have asked the Commission to adopt rules designed to improve cellular coverage at the Gulf shoreline and nearby land areas, to provide coverage into unserved coastal waters in the Gulf, and to improve coverage into coastal waters. In particular, these carriers have asked the Commission to adopt rules extending the market area of all land-based cellular providers adjacent to the Gulf 25 to 50 miles into the Gulf. The action requested is based upon the general characteristics of the industry and on technical and economic factors applicable to all cellular providers in and around the Gulf of Mexico. As such, the requested FCC action

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6 *CECR v. FCC*, 53 F.3d at 1318-1319, *citing Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 451 (D.C. Cir. 1991).

7 *Id.* at 1319, *citing Telocator Network v. FCC*, 691 F.2d 525, 551 (D.C. Cir. 1982) and *WBEN v. United States*, 396 F.2d 601, 617-618 (2d Cir.) *cert. denied* 393 U.S. 914 (1968).

8 *Id.* at 1320.

constitutes establishment of rules of general applicability appropriate for a rulemaking proceeding.

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